Mailed 5/3/99

IN THE MATTER OF:	*	
	*	
Gary W. Cookson	*	
Claimant	*	Case No.: 1998-LHC-2263
	*	
against	*	OWCP No.: 1-130540
	*	
Electric Boat Corporation	*	
Employer/Self-Insurer	*	

Stephen C. Embry, Esq.

Robert P. Audette, Esq.
For the Claimant

John W. Greiner, Esq.
For the Employer/Self-Insurer

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - DENYING ADDITIONAL BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on December 3, 1998 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence consists of the following:[1]

Exhibit Number	**Item**	**Filing Date**
ALJ EX 10	This Court's **ORDER** establishing a briefing schedule	03/08/99
CX 6	Claimant's brief	04/01/99

[1]As Claimant did not file a response to RX 12, this exhibit is admitted into evidence **de bene esse**.

The record was closed on April 7, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On February 11, 1994, his last day of work, Claimant suffered an injury in the course and scope of his employment which consists of a binaural hearing loss, the percentage of which is in dispute.

4. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

5. The parties attended an informal conference on May 13, 1998.

6. The applicable average weekly wage is $625.05.

7. The Employer has paid compensation and medical benefits for Claimant’s 25.30 percent binaural hearing loss, based upon his May 9, 1994 audiogram.

The unresolved issues in this proceeding are:

1) The extent of Claimant's current occupational hearing loss.

2) Whether he can be compensated for his current hearing loss.

For the reasons stated herein, this Court finds that the Employer had timely notice of Claimant's hearing loss and that Claimant filed a timely claim for compensation. This Court further finds that Claimant presently suffers from a 25.30 percent binaural hearing loss arising out of and in the course of his employment and that the Employer is not only responsible for benefits awarded herein, but also that the Employer has already paid to Claimant appropriate benefits for that hearing loss.

Summary of the Evidence

On November 10, 1975, Gary W. Cookson (“Claimant” herein), commenced employment at the Quonset Point Facility of the Electric Boat Company, then a division of General Dynamics Corporation (herein "Employer"), a maritime facility adjacent to the navigable waters of the Narraganset Bay and the Atlantic Ocean, where the Employer builds components for submarines. Claimant was hired as a structural welder and mostly worked on submarine component. While at the Employer's shipyard, Claimant was exposed to loud noises every day, including but not limited to the noise generated by the grinding, chipping and gouging of metal by the trade workers around Claimant. (TR 24-27; RX 3)

Claimant left the Employer's shipyard on February 11, 1994 (RX 3) and went to work as a custodian at a local school. While in that position, Claimant was exposed to some occasional noise, but not to the extent he experienced at the Employer's shipyard. (TR 27-28)

On behalf of the Claimant, the September 28, 1998 medical report of Dr. Warren F. Woodworth was introduced. (CX 2) Dr. Woodworth reviewed an audiogram performed on Claimant at his office. This audiogram, which is dated September 22, 1998 (CX 2), revealed a 36.50 percent binaural hearing loss which Dr. Woodworth opined was sensorineural in nature and was consistent, in part, with employment-related noise exposure. Dr. Woodworth based this opinion on the Claimant's history report, the physical examination and his review of Claimant's audiogram. (CX 2)

On behalf of the Employer, the May 9, 1994 report of May Kay Uchmanowicz, M.S., CCC-A, was introduced. (RX 7-1) Ms. Uchmanowicz administered to Claimant an audiogram (RX 7-3) which revealed a 25.80 percent binaural hearing loss. (RX 7-2) Ms. Uchmanowicz opined that this impairment is high frequency and sensorineural in nature and attributed this loss, in part, to Claimant's employment at the shipyard. (RX 7-2)

On the basis of the totality of the record and having observed the demeanor and having heard the testimony of a credible Claimant, this Court makes the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite**

v. Dresser Guiberson Pumping, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**,

619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral hearing loss, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

I. Notice and Timeliness of Claim

Under the 1984 Amendments to the Act, in hearing loss cases the time for filing a notice of injury under Section 12 and a claim for compensation under Section 13 does not begin to run until the employee has received an audiogram and a report indicating that he has suffered a work-related hearing loss. Section 8(c)(13)(D) as amended by P.L. 98-426, enacted September 28, 1984. **Mauk v. Northwest Marine Iron Works**, 25 BRBS 118 (1991); **Fucci v. General Dynamics Corp., 23 BRBS 161 (1990); Fairley v. Ingalls Shipbuilding**, 22 BRBS 184 (1989), **aff'd in part**, **rev'd in part and remanded sub nom. Ingalls Shipbuilding v. Director, OWCP**, 898 F.2d 1088 (5th Cir. 1990), **Rehearing En Banc denied**, 904 F.2d 705 (June 1, 1990); **Machado v. General Dynamics Corp.**, 22 BRBS 176 (1989); **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Macleod v. Bethlehem Steel Corp.**, 20 BRBS 234 (1988). **See also Alabama Dry Dock and Shipbuilding Corporation v. Sowell**, 933 F.2d 1561, 24 BRBS 229 (11th Cir. 1991).

Claimant's hearing acuity was tested by Dr. Woodworth, through his office on September 22, 1998 and he learned of his hearing impairment on the date of this examination. He received a copy of the audiogram and the doctor's report on or about September 28, 1998. (CX 2) The notice and filing periods in this case, thus, began to run on September 22, 1998. Claimant's claim for benefits was initially received by the Employer on April 28, 1994. (RX 4)

Clearly, the requirements of Sections 12 and 13 have been satisfied by Claimant. **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301 (1989); **Fucci, supra**; **Fairley, supra**; **Machado, supra**; **Grace, supra**; **Macleod, supra**.

II. Nature and Extent of Disability

A. Causal Connection

The Claimant must allege an injury which arose out of and in the course of his employment. **U.S. Industries v. Director, Office of Workers' Compensation Programs**, 455 U.S. 608, 102 S.Ct. 1312 (1982). The term "arose out of" refers to injury causation. (**Id.**) The Claimant must allege that his injury arose in the course of his employment as the Section 20 presumption does not substitute for allegations necessary for Claimant to state a **prima facie** case. (**Id.**)

The medical evidence before this Court clearly establishes that Claimant suffered a hearing loss arising out of and in the course of his work at the Employer's shipyard. Dr. Woodworth, based upon Claimant's personal history and upon a physical examination, during which an audiogram was administered, opined that Claimant suffered from a sensorineural hearing loss in both ears which was consistent, in part, with noise-induced loss and due to employment-related noise exposure. (CX 2)

On behalf of the Employer, the report of Mary Kay Uchmanowicz was introduced. Ms. Uchmanowicz, after conducting a physical examination, which also included an audiogram, opined that Claimant suffers from a high frequency sensorineural binaural hearing loss that had been sustained while at the Employer's shipyard although some of the hearing loss may be non-work-related and/or due to presbycusis (**i.e.**, the natural aging process). (RX 7)

The well-reasoned and well-documented reports of Dr. Woodworth and Ms. Uchmanowicz, together with Claimant's testimony and the lack of evidence of non-employment related exposure to noise, demonstrate a causal connection between Claimant's hearing impairment and his work at the Employer's shipyard. This Court thus finds that Claimant has satisfied the rule in **U.S. Industries, supra**, and that the Employer/Self-Insurer is responsible for Claimant's work-related hearing loss. **See Fucci v. General Dynamics Corp.;** 23 BRBS 161 (1990); **McShane v. General Dynamics Corp.**, 22 BRBS 427 (1989); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301 (1989).

While the record reflects that Claimant had some degree of hearing loss at the time he was retained in employment by the Employer in 1989 (RX 6), it is well-settled that the Employer takes its workers "as is," with all the human frailties, and the Employer is responsible for the combination or aggravation of such pre-

existing disability with a subsequent work-related injury subject, of course, to the limiting provisions of Section 8(f) in appropriate situations. Moreover, while Claimant's hearing loss is due to both employment-related noise exposure and to non-employment related factors, it is well-settled that the Employer is liable for Claimant's entire binaural hearing loss. **Epps v. Newport News Shipbuilding and Dry Dock Company**, 19 BRBS 1 (1986); **Worthington v. Newport News Shipbuilding and Dry Dock Company**, 18 BRBS 200 (1986). Furthermore, the Board has held that the aggravation rule does not permit a deduction from Employer's liability in hearing loss cases for the effects of presbycusis (**i.e.**, hearing loss due to the aging process). **Ronne v. Jones Oregon Stevedoring Company**. 22 BRBS 344 (1989), **aff'd in pertinent part and rev'd on other grounds sub nom. Port of Portland v. Director, OWCP**, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991).

Thus the Employer is responsible for all of Claimant's hearing loss.

B. Degree of Hearing Loss

The 1984 amendments provide that an audiogram "shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof . . ." if it was administered by a licensed or certified audiologist or a physician certified in otolaryngology, was provided to the employee at the time it was performed, and if no contrary audiogram made at the same time (or within thirty (30) days thereof) is produced. Section 8(c)(13)(C) as amended. **See Manders v. Alabama Dry Dock and Shipbuilding Corp.**, 23 BRBS 19 (1989); **Gulley v. Ingalls Shipbuilding, Inc.** 22 BRBS 262 (1989), **aff'd in part, rev'd in part and remanded sub nom. Ingalls Shipbuilding v. Director, OWCP**, 898 F.2d 1088 (5th Cir. 1990), **Rehearing En Banc denied**, 904 F.2d 705 (June 1, 1990).

Regarding Claimant's present hearing loss, at least two audiograms appear in the record. On September 22, 1998, Claimant's hearing was tested by a certified audiologist at ENT Associates of Westerly. Claimant received a copy of these results through his attorney.(CX 2) Thus, the audiogram meets the requirements of Section 8(c)(13)(C) and is deemed presumptive evidence of the extent of Claimant's hearing loss as of September 22, 1998. The results calculated under the JAMA standard are:

September 22, 1998 (CX 2)

	Left Ear	**Right Ear**
500 Hz	25 dB	25 dB
1000 Hz	35	35

2000 Hz	70		65
3000 Hz	80		70
Monaural	41.20%		35.60%
Binaural		36.50%	

Claimant has alleged and this Court verifies that the JAMA interpretation of this audiogram reveals a 36.50 percent binaural hearing loss. (TR 15)

The record also contains an audiogram of a hearing test performed on May 9, 1994 by Mary Kay Uchmanowicz, M.S., CCC-A (RX 7) A report of this audiogram also was given to Claimant through his attorney. Thus, the audiogram meets the requirements of Section 8(c)(13)(C) and is deemed presumptive evidence of the extent of Claimant's hearing loss as of May 9, 1994. The results calculated under the JAMA standard are:

May 9, 1994 (RX 7-3)

	Left Ear		**Right Ear**
500 Hz	15 db		15 dB
1000 Hz	30		20
2000 Hz	65		65
3000 Hz	70		65
Monaural	30.00%		24.40%
Binaural		25.30%	

Mr. Hans has opined that the resulting binaural hearing loss of Claimant, as evidenced by this audiogram, is 25.30 percent. (RX 5-1)

C. **Entitlement**

Claimant is entitled to compensation for his hearing loss under the 1984 Amendments to the Longshore and Harbor Workers' Compensation Act. Section 10(i) provides that Claimant's time of injury and average weekly wage shall be determined using the date on which the Claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between his employment, his hearing loss and his disability. The date of onset for payment of Claimant's benefits is the date the evidence of record first demonstrates a permanent hearing loss. **Howard v. Ingalls Shipbuilding, Inc.**, 25 BRBS 192 (1992).

For purposes of Section 8(c)(13) and his hearing loss, the date of Claimant's injury is the date of manifestation. The record reflects that Claimant received a copy of the May 9, 1994 audiologist's (CX 3) report on or about May 4, 1994 and that he

filed a claim on or about April 24, 1994. (RX 1) Moreover, Claimant left work at the Employer's shipyard on February 11, 1994 and continues to work as a custodian at a local school. (TR 27) Thus, the Court finds May 4, 1994 to be the date Claimant learned that his disability was work-related and the date of manifestation for Section 8 purposes. This Court additionally concludes that Claimant's average weekly wage is $625.05, as stipulated by the parties and corroborated by the record. (TR 7; RX 10) **Fucci, supra**; **Fairley**, **supra**; **Grace**, **supra**.

Claimant points out that his serial audiograms taken at the Employer's shipyard from 1981 through April 14, 1993 reflect the following values (CX 1):

FEBRUARY 24, 1981	5.31%
MAY 04, 1988	23.75%
JUNE 02, 1989	26.26%
APRIL 04, 1990	34.06%
FEBRUARY 28, 1991	30.94%
FEBRUARY 13, 1992	35.63%
APRIL 14, 1993	30.94%

An additional audiogram was taken while Mr. Cookson was employed at Electric Boat. This audiogram was taken at Rhode Island Hospital in 1989 and showed a hearing loss at that time of 24.73%. (RX 6) This finding closely matches the Employer's findings at that time.

Following leaving Electric Boat, Claimant has had three audiograms. Claimant was seen by Mary Kay Uchmanowicz on May 04, 1994 and was rated as having a 25.3% hearing loss. (RX 7) Claimant was again seen by Mary Kay Uchmanowicz on June 04, 1997 and was rated as having a 36.5% hearing loss. (CX 3) Dr. Warren Woodworth saw Mr. Cookson on September 22, 1998 and found a 36.5% hearing loss. (CX 2)

The parties have agreed that noise exposure was a significant causative factor in Claimant's hearing loss and the Employer has paid benefits based upon an agreed upon average weekly wage of$625.05 (TR 7), a rate which was calculated based upon the last 52 weeks of employment pursuant to **Bath Iron Works v. Director, OWCP**, 26 BRBS 151 (CRT) (Supreme Court)

As already noted, Claimant paid for a 25.3% hearing loss based upon the Uchmanowicz May 04, 1994 audiogram (RX 7), despite the

fact that Electric Boat's own audiograms of 1992 and 1993 showed a hearing loss of 30.94% and 35.63%. (CX 1)

This is also despite the fact that there were similar findings of 36.5% and 36.9% in 1997 and 1998, according to Claimant's thesis.

Thus, Claimant submits that his hearing loss actually is 36.50 or 36.90 bilaterally and that the Employer's voluntary payment of 25.3% has resulted in a significant overpayment.

On the other hand, the Employer submits that it has already paid the Claimant benefits for a 25.3% binaural hearing loss, based upon an audiogram taken a few months after he left maritime employment. Since then, the Claimant has had several subsequent audiograms which indicate that the hearing loss has progressed. The Claimant contends that he should be compensated for the progression of his hearing loss, while the Employer contends that the Claimant was fully compensated. The Supreme Court has held that a hearing loss is complete upon removal from the injurious stimuli for purposes of both calculating the compensable injury, as well as the average weekly wage.

Thus, the Employer contends that this claim should be denied and dismissed as the Claimant has been fully compensated under the Act as he is not entitled to any additional benefits herein.

Under the Act, the Claimant is entitled to be compensated for a work-related hearing loss due to exposure to injurious stimuli while performing maritime employment. **See** 33 U.S.C.§9O8(13). In the instant case, the Employer did voluntarily pay the Claimant for his binaural hearing loss, based upon an audiogram taken shortly after he left the maritime employment.

The Claimant left the employ of Electric Boat in February 1994. In May 1994, his hearing was tested by a certified audiologist. That test revealed a 25.3% binaural hearing loss. (RX-7; CX 4) Subsequent to that test, the Claimant was tested in 1997 and 1998. (CX-2, CX-3) Those tests indicated an increase in the hearing loss. It is this increase in hearing loss for which the Claimant seeks benefits on the premise that the noise-induced hearing loss continues even after he was removed from the injurious stimuli.

The Supreme Court has stated that an occupational hearing loss results in an immediate disability, and is complete upon the removal from the injurious stimuli. See **Bath Iron Works Corp. v. Director, OWCP**, 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993). The Court specifically rejected the premise that a hearing loss gets worse once the employee is away from the noise. Further, the Court noted that the hearing loss manifests itself immediately, unlike a latency disease such as asbestosis.

> Occupational hearing loss, unlike a long-latency. disease such as asbestosis, is not an occupational disease that does not "immediately result in ... disability." 13 U.S.C. §910(i). Whereas a worker who has been exposed to harmful levels of asbestos suffers no injury until the disease manifests itself years later, a worker who is exposed to excessive noise suffers the injury of loss of hearing, which, as a scheduled injury, is presumptively disabling, simultaneously with that exposure.
>
> The injury, loss of healing, occurs simultaneously with the exposure to excessive noise. Moreover, the injury is complete when the exposure ceases. Under those circumstances, we think it quite proper to say that the date of last exposure - the date upon which the injury is complete - is the relevant time of injury for calculating a retiree's benefits for occupational hearing loss. See **Bath Iron Works**, 26 BRBS at 54 (CRT)(emphasis added).

Indeed, the Court noted that an Employer can "freeze" its liability for an occupational hearing loss by ordering an audiogram at the time of the employee's retirement. In this case, there was an audiogram performed a few months after the Claimant left the employ of the shipyard. That test indicated a 25.3% binaural hearing loss, which the Employer paid.

Based on the foregoing, the Employer contends that the Claimant is not due any further compensation. The May 1994 audiogram was in compliance with 20 C.F.R §702.441(b)(1)-(3) & (d), and is valid under the Act. As such, this claim should be denied and dismissed.

Claimant makes a valiant attempt to limit the holding of the U.S. Supreme Court in **Bath Iron Works Corporation, supra,** by citing decisions of the U.S. Court of Appeals for the Second Circuit in **Gencarelle v. General Dynamics Corp.,** 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989), **aff'g** 22 BRBS 170 (1989), and **Morales v. General Dynamics Corp.,** 769 F.2d 66, 17 BRBS 130 (CRT) (2d Cir. 1985).

However, those cases are clearly distinguishable and their precedential value must be re-evaluated after **Bath Iron Works Corporation, supra.** Moreover, as I stated from the bench, it would be with the utmost of trepidation and **chutzpah** were I to accept Claimant's thesis and to limit **Bath** in the manner requested, **i.e.,** base Claimant's hearing loss on shipyard audiograms performed between 1992 and 1994.

Initially, I note that those shipyard audiograms are so-called "screening" tests designed to identify workers who are at risk for hearing problems. Moreover, the tests are given by registered

nurses and not by certified audiologists and those tests are not used as the basis for an award of current compensation.

On the other hand, Claimant's May 9, 1994 audiogram was performed by a highly respected certified audiologist, whose audiograms I have seen on numerous occasions, and who once worked for the Employer and who was trained by Jay C. Hans, the Employer's Principal Audiologist. Moreover, those shipyard audiograms also reflect in my judgment, so-called temporary threshold shift as the employee is taken from his immediate work area, with its attendant loud noises, and then goes to the Yard Hospital for the screening test. Such shift can be seen in the test values from 1988 to 1993. (CX 1)

Accordingly, I find and conclude that Claimant's hearing loss was fully perfected as of February 11, 1994, his last day of work, that his hearing loss, for compensation purposes under the Act, was "frozen" as of May 9, 1994 and that, as of that date, his compensable hearing loss amounted to 25.30 percent bilaterally. As the Employer has voluntarily paid that amount, he is not entitled to any additional benefits herein and his claim therefor must be **DENIED**.

III. Medical Benefits

Claimant is entitled to medical benefits under Section 7 of the Act for reasonable, necessary and appropriate expenses related to his loss of hearing.

However, as there are no unpaid medical benefits herein and as a claim for medical benefits is never time-barred, Claimant is not entitled at this time, to an award of future medical expenses.

IV. Claimant is Not Entitled to Additional Compensation Benefits

Since Claimant has been fully compensated for his May 4, 1994 injury, he is not entitled to additional benefits in this proceeding and his claim for benefits is hereby **DENIED**.

Since Claimant's increased hearing loss is due to presbycusis or non-maritime employment factors, he is not entitled to benefits in this proceeding and his claim for benefits is hereby **DENIED**.

The rule that all doubts must be resolved in Claimant's favor does not require that this Administrative Law Judge always find for Claimant when there is a dispute or conflict in the testimony. It merely means that, if doubt about the proper resolution of conflicts remains in the Administrative Law Judge's mind, these doubts should be resolved in Claimant's favor. **Hodgson v. Kaiser Steel Corporation**, 11 BRBS 421 (1979). Furthermore, the mere existence of conflicting evidence does not, **ipso facto**, entitle

a Claimant to a finding in his favor. **Lobin v. Early-Massman**, 11 BRBS 359 (1979).

While claimant correctly asserts that all doubtful fact questions are to be resolved in favor of the injured employee, the mere presence of conflicting evidence does not require a conclusion that there are doubts which must be resolved in claimant's favor. **See Hislop v. Marine Terminals Corp**., 14 BRBS 927 (1982). Rather, before applying the "true doubt" rule, the Benefits Review Board has held that this Administrative Law Judge should attempt to evaluate the conflicting evidence. **See Betz v. Arthur Snowmen Co**., 14 BRBS 805 (1981).

Moreover, the U.S. Supreme Court has abolished the "true doubt" rule in **Maher Terminals, Inc. v. Director**, OWCP, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), aff'g 992 F.2d 1277, 27 BRBS 1 (CRT)(3d Cir. 1993).

Although Claimant has not successfully prosecuted this claim, **i.e.** as the proceeding before the Office of Administrative Law Judge did not result in any additional compensation other than that which Employer voluntarily paid, Claimant's attorney may still be entitled to a fee and such fee shall be considered in a supplemental decision.

ORDER

It is therefore **ORDERED** that the claim for additional compensation benefits filed by Gary W. Cookson shall be, and the same is hereby **DENIED**.

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DAVID W. DI NARDI
Administrative Law Judge

Dated: May 3, 1999
Boston, Massachusetts
DWD:dr